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RESPONSE REQUESTED

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No. 08-5657

IN THE SUPREME COURT OF THE UNITED STATES

LAWRENCE W. NELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in sentencing petitioner for his cocaine base conspiracy, the district court erred because it applied a presumption of reasonableness to the advisory Sentencing Guidelines range.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter, but is available at 276 Fed. Appx. 331. An earlier opinion of the court of appeals (Pet. App. 9a-14a) is also not published in the Federal Reporter, but is available at 237 Fed. Appx. 819.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2008. The petition for a writ of certiorari was filed on August 5, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of West Virginia, petitioner was convicted of a drug conspiracy involving cocaine base and sentenced to 360 months of imprisonment, the bottom of the advisory Guidelines range. The court of appeals affirmed. This Court vacated the judgment and remanded for further consideration in light of Rita v. United States, 127 S. Ct. 2456 (2007). On remand, the court of appeals again affirmed.

1. Petitioner was part of "a loosely-knit association of members * * * whose purpose was to distribute crack cocaine in West Virginia." Pet. App. 11a. Employing a network of runners, petitioner regularly distributed crack cocaine at various residential and commercial locations. Gov't C.A. Br. 5. Petitioner carried a firearm during his drug distributions, traded firearms for crack cocaine, and kept a firearm where he stored his crack cocaine. Id. at 6.

On September 4, 2003, petitioner was charged, in a multi-defendant indictment, with one count of conspiracy to possess with intent to distribute and to distribute more than 50 grams of cocaine base, in violation of 21 U.S.C. 846; one count of aiding and abetting the distribution of 0.58 grams of cocaine base, in violation of 18 U.S.C. 2 and 21 U.S.C. 841(a)(1); and one count of possession with intent to distribute 2.02 grams of cocaine base, in

violation of 21 U.S.C. 841(a)(1), a count that the district court later dismissed on the government's motion. Gov't C.A. Br. 3. In July 2004, after a two-week trial, the jury found petitioner guilty on the conspiracy count but acquitted him on the distribution count. Ibid.

2. At petitioner's sentencing, the district court calculated his total offense level under the Sentencing Guidelines as 41, using a base offense level of 36 because the conspiracy involved more than 500 grams of crack, adding two levels for possession of a firearm in relation to a drug trafficking crime, and adding three levels for petitioner's leadership role in the offense. Gov't C.A. Br. 4. Petitioner's criminal history category was VI, which yielded a recommended sentencing range under the advisory Sentencing Guidelines of 360 months to life imprisonment. Ibid. The district court sentenced petitioner at the bottom of that range, to 360 months of imprisonment. Ibid.; see C.A. J.A. 1109. The court acknowledged that "the Guidelines are advisory," id. at 1108, and it considered the sentencing factors in 18 U.S.C. 3553(a), see C.A. J.A. 1104-1108. At the same time, the court stated that "under the case law of the Fourth Circuit Court of Appeals, * * * the Guidelines are considered presumptively reasonable." Id. at 1108. The court elaborated that, in its view, that presumption means that, "unless there's a good reason in the

[Section 3553(a)] factors * * *, the Guideline sentence is the reasonable sentence in the case." Ibid.

3. The court of appeals affirmed petitioner's conviction and sentence in a unpublished per curiam opinion. Pet. App. 9a-14a. In response to petitioner's challenge to the sufficiency of the evidence to support his conviction, the court of appeals "carefully reviewed the trial testimony" and found "that the evidence was sufficient to convict [petitioner] of conspiracy to distribute crack cocaine." Id. at 11a. The court of appeals found no abuse of discretion in the district court's evidentiary rulings or in the court's denial of petitioner's request for a continuance. Id. at 12a-13a.

As for petitioner's sentence, the court of appeals stated that "it is well established in this circuit that a sentence imposed within a properly calculated guideline range is presumed to be reasonable." Pet. App. 13a (citing cases). The court of appeals added that petitioner's argument that "the district court's reliance on this presumption of reasonableness" contravened United States v. Booker, 543 U.S. 220 (2005), was "foreclosed" by this Court's subsequent decision in Rita v. United States, 127 S. Ct. 2456 (2007). Pet. App. 14a.

4. Petitioner filed a petition for a writ of certiorari, in which he contended that the district court erred by applying a presumption that a sentence within the advisory Guidelines range is

a reasonable one. 07-7380 Pet. (filed Oct. 29, 2007). In response, the government acknowledged that, in Rita, this Court held that a court of appeals may apply a presumption of reasonableness in reviewing a within-Guidelines sentence, but further stated that district courts may not presume that a within-Guidelines sentence is appropriate when they impose sentence. 07-7380 Mem. for the U.S. 1. The government conceded that, in petitioner's case, "the district court applied a presumption of reasonableness and considered the factors in 18 U.S.C. 3553(a) through the prism of that presumption." Id. at 2. Moreover, the government added, even though the district court expressed disagreement with the policy of the Guidelines in this case, the court "felt that the governing law restricted its ability to vary on that ground." Ibid. See C.A. J.A. 1109 (statement by district court that "I personally disagree with [the crack cocaine guidelines], but that doesn't mean that I can ignore them"). Because the district court applied a presumption of reasonableness to the sentencing range recommended by the Guidelines, the government recommended that "the petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for further consideration in light of Rita, subject to applicable doctrines of waiver, forfeiture, and harmless error." 07-7380 Mem. for the U.S. 2.

On January 22, 2008, this Court granted the petition for a writ of certiorari, vacated the court of appeals' judgment, and remanded "for further consideration in light of Rita." Pet. App. 8a.

5. On remand, without requesting supplemental briefing or oral argument, the court of appeals issued another unpublished per curiam opinion affirming the 360-month sentence imposed by the district court. Pet. App. 1a-5a. After describing this Court's holding in Rita, the court of appeals again rejected petitioner's assertion that the district court treated the Guidelines as mandatory. Id. at 4a. The court of appeals stated that the district court "understood that the guidelines were advisory and that it could impose a sentence outside of the guidelines range." Ibid. The court of appeals added that "the district court exercised its discretion not to vary from the advisory guideline range and decided instead to impose a sentence at the bottom of the range." Ibid. Finding that the district court had not committed any procedural error in sentencing petitioner in that fashion, the court of appeals affirmed petitioner's sentence. Id. at 4a-5a. The court of appeals also reinstated its prior opinion affirming petitioner's conviction on the other grounds raised by petitioner before this Court's remand. Id. at 2a n.*.

DISCUSSION

Petitioner renews his contention (Pet. 10-11) that his 360-month sentence should be vacated because the district court "viewed the Guidelines as mandatory by stating that * * * 'the Guidelines are presumptively reasonable.'" Pet. 10. Petitioner argues that the court of appeals misread the record when it rejected that claim on remand from this Court's decision granting the initial petition for a writ of certiorari. Pet. 10-11.

As the government noted in response to the initial petition for a writ of certiorari, although the district court correctly recognized that the Guidelines are advisory, the court incorrectly "applied a presumption of reasonableness" to the sentencing range recommended by the Guidelines, and the court "considered the factors in 18 U.S.C. 3553(a) through the prism of that presumption." 07-7380 Mem. for the U.S. 2. That was error. This Court made clear in Rita that, although a court of appeals may apply a presumption of reasonableness when reviewing a within-Guidelines sentence on appeal, "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." Rita, 127 S. Ct. at 2456 (citing Booker, 543 U.S. at 259-260). The Court reiterated that point in Gall v. United States, 128 S. Ct. 586, 596-597 (2007), stating that, in considering the Section 3553(a) factors, the district court "may not presume that the Guidelines range is reasonable."

This Court granted petitioner's initial petition for a writ of certiorari, vacated the decision of the court of appeals, and remanded for "further consideration in light of Rita." Pet. App. 8a. On remand, the court of appeals indicated that it was aware that a district court may not apply a presumption that the Guidelines-recommended sentence is reasonable. See Pet. App. 2a (quoting the above-quoted language from Rita). The court of appeals nonetheless affirmed petitioner's sentence after rejecting his argument that the district court had treated the Guidelines as mandatory rather than advisory -- without directly addressing the fact that the district court had applied a presumption of reasonableness to the Guidelines-recommended sentence, i.e., the crux of the Rita error. See Pet. App. 3a ("Although [petitioner] asserts that the district court treated the guidelines as mandatory, we find, taking the district court's comments at sentencing as a whole, the court did not do so.").

In our view, the court of appeals' summary disposition on remand did not squarely address petitioner's contention in light of Rita. Although petitioner's brief did assert that the sentencing court treated the Guidelines as mandatory, the reasoning underlying that contention was that the court improperly presumed the Guidelines range to be reasonable. Petitioner supported that claim by quoting the district court's statement revealing that it had applied such a presumption in this case. See Pet. C.A. Br. 14

("The District Court treated the guidelines as mandatory by stating that 'the guidelines are advisory but * * * are considered presumptively reasonable. * * * That means that unless there's a good reason in the [Section 3553(a)] factors * * *, the Guideline sentence is the reasonable sentence in this case.'"); see also Pet. App. 14a (initial opinion of court of appeals noting that petitioner "claims that the district court's reliance on this presumption of reasonableness rendered the guidelines sentence it imposed mandatory"). Accordingly, while the court of appeals was correct that the district court recognized that the Guidelines are advisory and not mandatory, that conclusion does not dispose of the distinct argument that the district court nevertheless incorrectly applied a presumption of reasonableness.

Ordinarily, the question whether the court of appeals correctly construed an appellant's claim would not warrant this Court's attention. In this instance, however, this Court itself remanded for reconsideration in light of Rita, and it is clear that the court of appeals' reconsideration did not squarely address the significance of that opinion on the record here. That may have occurred because, on remand from this Court, neither petitioner nor the government was afforded the opportunity to respond to the Court's remand order. The omission of that step may have led the court of appeals to overlook the full significance of Rita as applied to the record here or to misconstrue petitioner's

contention as arguing only that the district court treated the Guidelines as mandatory (without regard to whether the district court applied a presumption of reasonableness). In the government's view, petitioner has fairly argued that the district court erroneously applied a presumption of reasonableness to the Guidelines range, see pp. 8-9, supra; the district court clearly erred under the later-announced rule in Rita by according such a presumption; and that error cannot be said to be harmless. See C.A. J.A. 1109 (district court stated its disagreement with the crack guidelines); Kimbrough v. United States, 128 S. Ct. 558, 575 (2007) ("[I]t would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purpose, even in a mine-run case.")

Under those circumstances, it would be appropriate for the Court once again to vacate the court of appeals' judgment and to remand for further proceedings in light of Rita and the position asserted in this brief. The court of appeals could then, after consideration of the government's position, either squarely confront the Rita problem and explain why it disagrees with petitioner's Rita argument or remand to the district court for resentencing in which the district court would not presume that a

sentence within the range recommended by the advisory Guidelines is reasonable.*

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for further proceedings in light of the position expressed in this brief.

Respectfully submitted.

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* Petitioner also raises (Pet. 5-9, 11-16) a number of additional, fact-bound claims that the court below misapplied settled law. None of those claims involves even an alleged conflict among the courts of appeals. Accordingly, the government waives any further response to the petition unless this Court requests otherwise. See 07-7380 Mem. for the U.S. 2 n.* (similarly waiving a response to petitioner's additional claims in the initial petition for a writ of certiorari).